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14 UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 GIL CROSTHWAITE, RUSS BURNS, in their
17 respective capacities as Trustees of the
18 OPERATING ENGINEERS HEALTH AND
19 WELFARE TRUST FUND FOR NORTHERN
20 CALIFORNIA; PENSION TRUST FUND
21 FOR OPERATING ENGINEERS;
22 PENSIONED OPERATING ENGINEERS
23 HEALTH AND WELFARE FUND;
24 OPERATING ENGINEERS AND
25 PARTICIPATING EMPLOYERS PRE-
26 APPRENTICESHIP, APPRENTICE AND
27 JOURNEYMEN AFFIRMATIVE ACTION
28 TRAINING FUND; OPERATING
ENGINEERS VACATION AND HOLIDAY
PLAN; OPERATING ENGINEERS
CONTRACT ADMINISTRATION TRUST
FUND; OPERATING ENGINEERS MARKET
PRESERVATION TRUST FUND;
OPERATING ENGINEERS INDUSTRY
STABILIZATION TRUST FUND; BUSINESS
DEVELOPMENT TRUST FUND; AND
HEAVY AND HIGHWAY COMMITTEE,

Case No.: C08-1560 MHP

COMPLAINT

Plaintiffs,

v.

JOLANDCO, INC, a California Corporation,

Defendant.

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-1-

COMPLAINT

Case No.: C08-1560 MHP

1
Parties

2 1. The Operating Engineers' Health and Welfare Trust Fund for Northern California;
3 Operating Engineers' Pension Trust Fund; Operating Engineers' Annuity Trust Fund; Pensioned
4 Operating Engineers' Health and Welfare Trust Fund; Operating Engineers and Northern
5 California Surveyors Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training
6 Fund; and Operating Engineers' Vacation and Holiday Pay Plan are employee benefit plans as
7 defined in the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C.
8 § 1002(3). Said plans and their respective fiduciaries are together referred to herein as "ERISA
9 Plaintiffs." Gil Crosthwaite and Russ Burns are Co-Chairmen of the Joint Boards of Trustees of
10 the ERISA Plaintiffs with authority to act on behalf of all Trustees.

12 2. Operating Engineers Local Union No. 3 of the International Union of Operating
13 Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor
14 Relations Act ("NLRA"), 29 U.S.C. § 152(5).

16 3. JOLANDCO, INC., a California corporation, is an employer by virtue of ERISA
17 § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2). Said entity is referred to
18 herein as "Defendant."

19
Jurisdiction

21 4. Jurisdiction exists in this Court over the claims asserted by the ERISA Plaintiffs by
22 virtue of ERISA § 502, 29 U.S.C. § 1132, in that the ERISA Plaintiffs seek to enforce the
23 provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which
24 violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief
25 under ERISA.

26 5. Jurisdiction exists in this Court over all the claims by virtue of Labor Management
27 Relations Act ("LMRA") § 301, 29 U.S.C. § 185, in that the ERISA Plaintiffs seek to enforce the

1 terms and conditions of a collective bargaining agreement between the employer and a labor
2 organization.

3 6. To the extent jurisdiction over any claim does not exist under ERISA or the
4 LMRA, supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C. §
5 1367 in that they arise out of a common nucleus of operative facts that form the basis of the
6 federal claims asserted herein, each of which has a substantial ground in federal jurisdiction.
7

Venue

9 7. Venue exists in this Court with respect to the claims under ERISA § 502 because
10 all of the plans of the ERISA Plaintiffs are administered within this district and the breach took
11 place in this district.

12 8. Venue exists in this Court with respect to the claims under LMRA §301(a) because
13 this Court has jurisdiction over the parties, as the Union maintains its principal place of business in
14 this district, its duly authorized officers or agents are engaged in representing employee members
15 in this district, and the claims arise in this district.
16

Intradistrict Assignment

18 9. The basis for assignment of this action to this court's Oakland Division is that all of
19 the events and omissions giving rise to the ERISA Plaintiffs' claims occurred in the County of
20 Alameda, where the ERISA Plaintiffs' funds and union dues were administered during the period
21 claimed herein, and where Defendant failed to fulfill its statutory and contractual obligations to the
22 ERISA Plaintiffs.
23

Bargaining Agreement

25 10. The Union and Defendant entered into a collective bargaining agreement requiring
26 employer contributions to the ERISA Plaintiffs' funds, to the Union for union dues and to the
27 Funds, all more fully described in the 2005-2009 Master Agreement for Technical Engineers and

1 General Surveying for Northern California and Nevada between Operating Engineers Local Union
 2 No. 3 of the International Union of Operating Engineers, AFL-CIO and Bay Counties Civil
 3 Engineers and Land Surveyors Association, Inc. (the "Association") to which Defendant is
 4 signatory by virtue of being a member of the Association. That Agreement is referred to herein as
 5 the "Bargaining Agreement," and the ERISA Plaintiffs and Funds, defined below, are third party
 6 beneficiaries of that Bargaining Agreement.
 7

8 11. The Operating Engineers Job Placement Center and Market Area Committee
 9 Administration Market Preservation Fund, the Operating Engineers Industry Stabilization Trust
 10 Fund, and Supplemental Dues, together referred to herein as the "Funds," are funds for which
 11 plaintiff Boards of Trustees are the assignees of monies due under the Bargaining Agreement.
 12

13 12. Under the terms of said Bargaining Agreement and of the governing documents of
 14 the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made
 15 binding on Defendant, Defendant is required to submit monthly reports of hours worked by its
 16 employees, and to regularly pay to the ERISA Plaintiffs' Funds, to the Union for union dues, and
 17 to the Funds, certain sums of money, the amounts of which are determined by the hours worked by
 18 employees of Defendant, all as more fully set forth in said Bargaining Agreement. Additionally,
 19 under the terms of said Bargaining Agreement and the governing documents of the ERISA
 20 Plaintiffs' funds, Defendant agreed to pay liquidated damages for each delinquent payment.
 21 Defendant further agreed to pay interest on the combined contributions and liquidated damages at
 22 the rates set by the Bargaining Agreement, from the day immediately following the date that each
 23 such payment became due until paid in full, all as more fully set forth in said Bargaining
 24 Agreement.
 25

26 13. Further, under the Bargaining Agreement Plaintiffs are permitted to conduct an
 27 audit of the Defendant's books and records in order to ascertain whether all wage and fringe
 28

1 benefit contributions have been paid as required by the applicable labor agreements and laws. A
 2 question exists concerning the lack of compliance by Defendant with the provisions requiring the
 3 prompt and correct payment of all contributions. Therefore, Plaintiffs have reasonable cause to
 4 demand that Defendant submit to an audit in accordance with the provisions of the Bargaining
 5 Agreement for the period from January 1, 2005, through the date of inspection. In the absence of
 6 an audit, the Plaintiffs have no way of knowing whether Defendant owes damages and whether
 7 Defendant is in compliance with §515 of ERISA, 29 U.S.C. §1145, and the provisions of the
 8 Bargaining Agreement. Pursuant to the terms of the Bargaining Agreement, Plaintiffs are entitled
 9 to all unpaid contributions, liquidated damages, interest, attorney's fees and costs, and all other
 10 reasonable expenses incurred in connection with Defendant's refusal and/or failure to pay all
 11 contributions, and with the resulting audit.

12 Facts

13 14. Defendant failed to submit reports and payment of contributions due for work
 14 performed by its employees during the month of January 2008. Further, Defendant reported but
 15 failed to pay contributions owing to the ERISA Plaintiffs under the Bargaining Agreement for
 16 work performed during the prior months of May 2007 and June 2007, and September 2007
 17 through December 2007. Liquidated damages on each delinquent contribution have been incurred
 18 and interest on the combined unpaid contributions and liquidated damages are owed for these time
 19 periods.

21 15. Demand was made on Defendant on behalf of the ERISA Plaintiffs, for the reports
 22 and payment of all delinquent contributions, liquidated damages and interest due to the ERISA
 23 Plaintiffs' funds, the Union, and the Funds. Defendant has failed and refused to make payment of
 24 any amounts due claimed herein, as required by the Bargaining Agreement.

26 16. Defendant has a statutory duty to make the required payments timely to the ERISA
 27 Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and by failing to make such timely payments has
 28 violated the law.

1 17. Defendant has a contractual duty under the Bargaining Agreement to timely make
 2 the required contributions, liquidated damages and interest to the ERISA Plaintiffs and the Funds,
 3 and to timely make the required payment of union dues to the Union. By failing to make such
 4 timely payments as required, defendant has breached said duty.

5 18. Defendant's failure and refusal to timely submit the aforesaid payments as alleged
 6 herein was at all times, and still is, willful. Said refusal is unjustified and done with malicious
 7 intent. Defendant's failure to timely make such payments in compliance with the Bargaining
 8 Agreement has reduced the corpus of the ERISA Plaintiffs' funds and operating ability of the
 9 Union, thereby impairing their ability to pay or provide benefits to members and beneficiaries, and
 10 thereby causing harm to all ERISA Plaintiffs funds and to the Union. Defendant's obligations
 11 pursuant to the Bargaining Agreement are continuing obligations; Defendant continues to breach
 12 said Bargaining Agreement by failing and refusing to timely pay monies due thereunder to the
 13 ERISA Plaintiffs' funds, the Funds, and the Union. Plaintiffs are informed and believe, and
 14 therefore allege, that Defendant will continue to willfully refuse to make said payments unless
 15 ordered by this Court to comply.

16 19. Plaintiffs are without an adequate remedy at law and will suffer continuing and
 17 irreparable injury, loss and damage unless Defendant is ordered specifically to perform all
 18 obligations required on Defendant's part to be performed under ERISA, 29 U.S.C. §§ 1101-1381,
 19 the LMRA, 29 U.S.C. §§ 141-197, the Bargaining Agreement, and the governing documents of
 20 the ERISA Plaintiffs' funds referred to therein, and are restrained from continuing to refuse to
 21 perform as required thereunder.

22 20. This Court is authorized to issue injunctive relief based on traditional standard. As
 23 set forth above, Plaintiffs have a strong likelihood of success on the merits, there is the possibility
 24

1 that the Board of Trustees and the participants will suffer irreparable injuries, and the balance of
 2 hardships and advancement of public interest favor Plaintiffs.

3 Prayer

4 WHEREFORE, Plaintiffs pray as follows:

5 1. For a judgment against Defendant as follows:

6 a. For all unpaid contributions due for hours worked as specified above and
 7 thereafter through judgment;

8 (1) To the ERISA Plaintiffs, in accordance with ERISA Section
 9 502(g)(2)(A), 29 U.S.C. Section 1132(g)(2)(A) and the Bargaining Agreement;

10 (2) To the Union in accordance with the Bargaining Agreement; and

11 (3) To the Funds in accordance with the Bargaining Agreement.

12 b. Liquidated damages on late paid and unpaid contributions in an amount
 13 provided for under the Bargaining Agreement and governing documents of the ERISA Plaintiffs'
 14 funds and with respect to the ERISA Plaintiffs, ERISA Section 502(g)(2)(c), 29 U.S.C. Section
 15 1132(g)(2)(c).

16 c. Interest on late paid and unpaid contributions and liquidated damages which
 17 become a part thereof, and union dues, at the rates set in accordance with the Bargaining
 18 Agreement, the governing documents of the ERISA Plaintiffs and the ERISA Section
 19 502(g)(2)(B), 29 U.S.C. Section 1132(g)(2)(B).

20 2. For any additional contributions and dues payable to the ERISA Plaintiffs and the
 21 Funds as third party beneficiaries of the Bargaining Agreement at time of judgment, plus interest
 22 and liquidated damages as above provided and in accordance with the Bargaining Agreement, the
 23 governing documents of the ERISA Plaintiffs' funds, and with respect to the ERISA Plaintiffs,
 24 ERISA Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).

3. The ERISA Plaintiffs' reasonable attorneys' fees and costs of this action, and for auditors' costs, in accordance with ERISA § 502(g)(2)(D) and (E), 29 U.S.C. § 1132(g)(2)(D) and (E); and in accordance with the collective bargaining agreement for all Bargained Plans, and with LMRA Section 301, 29 U.S.C. § 185 for all Plaintiffs.

4. For an order,

(a) compelling Defendant to forthwith submit to an audit of its books and records by auditors selected by Plaintiffs for the time period beginning January 1, 2005, through the date of inspection, as required by the Bargaining Agreement to which they are bound, and upon completion of said audit, the Defendant be decreed to pay to Plaintiffs such contributions, plus liquidated damages and interest accrued thereon, as shall be ascertained to be due based upon the audit, according to proof;

(b) requiring that Defendant comply with its obligations to Plaintiffs under the terms of the Bargaining Agreement and the governing documents referred to therein;

(c) enjoining Defendant from violating the terms of those documents and of ERISA; and

(d) enjoining Defendant from disposing of any assets until said terms have been complied with, and from continuation or operating of Defendant's business until said terms have been complied with.

5. That the Court retain jurisdiction of this case pending compliance with its orders.

6. For such other and further relief as the Court may deem just and proper.

Dated: March 21, 2008

SALTZMAN & JOHNSON
LAW CORPORATION

By: _____/s/ _____
Muriel B. Kaplan
Attorneys for Plaintiffs